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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1972

Nos. 72-792, 72-802

NEW YORK STATE DEPARTMENT OF SOCIAL SERVICES; its Commissioner, ABE LAVINE: NEW YORK STATE DEPARTMENT OF INDUSTRIAL RELATIONS; its Commissioner, LOUIS L. LEVINE: ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES and its Commissioner, GEORGE C. SIPPRELL,

Appellants,

and

ONONDAGA COUNTY DEPARTMENT OF SOCIAL SERVICES and its Commissioner, JOHN L. LASCARIS,

Intervenors-Appellants,

against

DOLORES DUBLINO, DORIS JIMERSON, VIRGINIA MICHAEL, JANIE LEE PHILLIPS and MARIA MARFOGLIA, on behalf of themselves and their minor children,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK

BRIEF FOR APPELLANTS NEW YORK STATE DEPARTMENTS OF SOCIAL SERVICES AND LABOR AND THEIR COMMISSIONERS

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Citation to Opinion Below

The opinion of the United States District Court for the Western District of New York is reported at 348 F. Supp. 290 (printed in Appendix to Jurisdictional Statement of Appellants).

Jurisdiction

The appeal herein is from a final judgment made and entered in the United States District Court for the Western District of New York by a specially constituted three-judge panel convened therein under 28 United States Code, §§ 2281 and 2284. The judgment holds the "New York Work Rules", comprising sections 131 (4) and 350-k of the New York Social Services Law, as added by Chapters 101 and 102 of the New York Laws of 1971, and the rules of the New York State Department of Social Services, adopted pursuant thereto and in implementation thereof (18 NYC RR, § 385.1 *et seq.*) unconstitutional insofar as they apply to applicants for and recipients of Aid to Families with Dependent Children (ADC). They were found to be unconstitutional on the ground that the State statutes and rules conflict with the Federal statutes relating to the Work Incentive Program (WIN) (42 U. S. C. §§ 602 (a) (10), 602 (a) (19) and 630 *et seq.*) and thus to be in violation of the Supremacy Clause of Article VI of the Constitution of the United States. The judgment enjoins the defendants (appellants here) from further implementation of the Work Rules as to ADC applicants and recipients.

The complaint sought declaratory and injunctive relief against enforcement of Chapters 101 and 102 of the New York Laws of 1971, and the rules adopted pursuant thereto, alleging that the statutes violated the Thirteenth Amendment to the Constitution of the United States, the Due Pro-

cess and Equal Protection Clauses of the Fourteenth Amendment, and conflicted with Federal statutes in violation of the Supremacy Clause of Article VI of the Constitution. Thus, while the Court below held the statutes unconstitutional only under the Supremacy Clause, there were also involved in the action, and considered by the District Court, issues under the other provisions of the Constitution of the United States invoked by the plaintiffs.

The New York statutes and rules provide for the referral of persons, deemed to be employable under the definition contained in New York Social Services Law, § 131 (4) and who are recipients of or applicants for public assistance, to the appropriate offices of the New York State Employment Service (SES) for job referral and manpower services, require semi-monthly reporting for such referral require recipients of public assistance to pick up assistance checks at the same employment office, and further provide for public works employment for persons not placed in regular employment.

The final judgment granting the relief sought in the complaint was made and entered August 25, 1972. Notice of Appeal to this Court on behalf of the State defendants was filed on September 28, 1972 in the United States District Court for the Western District of New York. Notices of appeal were also filed on behalf of the plaintiffs, the Erie County defendants, and the Onondaga County intervenor-defendants.

The appeal on behalf of the State defendants was docketed November 29, 1972; that of the Onondaga County defendants on December 1, 1972. On January 15, 1973 this Court directed argument on the merits but reserved decision as to jurisdiction (this Court has not yet acted upon the plaintiffs' appeal).

This Court has jurisdiction to review by direct appeal the final judgment above cited pursuant to the terms of 28 United States Code, Sections 1253 and 2101 (b). This Court also has jurisdiction to review the final judgment since, not only the complaint raised issues other than the Supremacy Clause, but also the Court below in its opinion considered at length the allegations and evidence concerning issues under the Thirteenth and Fourteenth Amendments to the Constitution of the United States. The only issue before the District Court was not, therefore, the Supremacy Clause of the United States Constitution. If this Court were to find that those other constitutional issues were not substantial, then the District Court itself had no jurisdiction in this case (*Hagans* v. *Wyman*, __ F. 2d __ [2nd Cir., Jan. 3, 1973]).

Constitutional and Statutory Provisions Involved

On this appeal, the only provision of the Constitution of the United States which is involved is the Supremacy Clause of Article VI.

New York Social Services Law (McKinney's Consolidated Laws of New York, Vol. 52-A), section 131 (4), as amended by Chapters 102 and 298, § 5 of the New York Laws of 1971, and as in effect when this action was commenced, provided:

> "4. No assistance or care shall be given to an employable person who has not registered with the nearest local employment agency of the department of labor or has refused to accept employment in which he is able to engage.
>
> "A person shall be deemed to have refused to accept such employment if he:
>
> a. Fails to obtain and file with the social services district at least once in every two-week period a new

certificate from the appropriate local employment office of the state department of labor stating that such employment office has no order for an opening in part-time, full-time, temporary or permanent employment in which the applicant is able to engage, or

b. wilfully fails to report for an interview at an employment office with respect to employment when requested to do so by such office, or

c. wilfully fails to report to such office the result of a referral to employment, or

d. wilfully fails to report for employment. Such wilful failures or refusal as above listed shall be reported immediately to the social services district by such employment offce.

"For the purposes of this subdivision and subdivision five, a person shall be deemed employable if such person is not rendered unable to work by: illness or significant and substantial incapacitation, either mental or physical, to the extent and of such duration that such illness or incapacitation prevents such person from performing services; advanced age; full-time attendance at school in the case of minor, in accordance with provisions of this chapter; full-time, satisfactory participation in an approved program of vocational training or rehabilitation; the need of such person to provide full-time care for other members of such person's household who are wholly incapacitated, or who are children, and for whom required care is not otherwise reasonably available, notwithstanding diligent efforts by such person to obtain others to provide such care. A person assigned to and participating in a public works project under the provisions of section one hundred sixty-four or three hundred fifty-k of this chapter shall be deemed to be employable but not employed.

"Every employable recipient of public assistance or person who is deemed not to be employable by reason of full-time satisfactory participation in an approved program of vocational training or rehabilitation shall receive his public assistance grants and allowances in

person from the division of employment of the state department of labor, in accordance with regulations of the department."

(Subdivision 5, referred to above, provides for referrals by the State Employment Service for vocational training.)

At its 1972 Session, the New York State Legislature amended section 131(4) to exempt persons engaged in full-time training and vocational rehabilitation programs from the reporting and check pick up requirements (Chapter 683, NY Laws of 1972). The New York Legislature further amended the statute to provide that shelter allowances would be paid monthly, rather than divided within the semi-monthly assistance payments (Chapter 685, NY Laws of 1972).

New York Social Services Law, § 350-k, as added by Chapter 101 of the New York Laws of 1971, provides for public works project employment for employable recipients of ADC who are not able to be placed in regular employment. (The full text of Chapter 101 is set forth in the appendix to this brief.) The public works projects so provided for are required to meet State and Federal requirements and to be established for the conservation of work skills, and/or the development of new skills of parents and other eligible relatives receiving ADC. The statute sets up standards of safety, compensation, and maximum number of days to be worked. No person may be required to work longer than necessary to earn the amount of his public assistance grant, or longer than eight hours in a day or forty hours in a week. Additionally, he must be given adequate time to seek employment in the regular economy. Because of Federal agency objections, section 350-k has never been implemented by the State of New York.

Question Presented for Review

Where, by determination of the United States Secretary of Labor, the Federal program for work and training referral of public assistance recipients (WIN) is not in operation in all welfare districts of the State and where, in those districts in which the program is in operation, the opportunities for referral of public assistance recipients have been limited by operation of Federal law and funding to only a fraction of the unemployed employable public assistance recipients, and Congress has not specifically stated that the WIN Program is the exclusive vehicle for job referral of such persons, can the State adopt programs and requirements for work referral and for public works employment of persons not eligible for referral under the Federal statute or for whom there are no employment or training positions available under the Federal program?

Statement of the Case

A. Factual Background

Plaintiffs, suing on behalf of themselves and their minor children, commenced this action seeking to have Chapters 101 and 102 of the New York Laws of 1971, and the rules promulgated pursuant thereto, declared unconstitutional, alleging that they violated the Thirteenth Amendment to the Constitution of the United States, the Due Process and Equal Protection Clauses of the Fourteenth Amendment and so conflicted with the Federal Social Security Act of 1935, as amended, and particularly with the WIN Program, that they were in violation of the Supremacy Clause of Article VI of the Constitution. The complaint sought a permanent injunction restraining the enforcement and implementation of the statutes.

The action was commenced by Order to Show Cause on July 1, 1971, the effective date of the statutes. Temporary restraining orders were signed by the Court as to the five original plaintiffs and, after the action had been determined by the Court to be a class action, temporary restraining orders were granted to approximately fifty other members of the plaintiff class, on motions by plaintiffs' attorneys, and denied to other members of the class. Restraining orders as to the entire class were denied (39).* Plaintiffs included in the temporary restraining orders reside in Erie (Buffalo), Onondaga (Syracuse), Cattaraugus, Broome (Binghamton), Orleans, Wyoming, Sullivan, Albany, Rensselaer, Rockland and New York Counties. The plaintiffs, on whose behalf the orders were issued, thus represented a geographic cross-section of the State and presumably also the range of difficulties and complaints concerning the implementation of the State Work Rules (156-187).

On Monday, March 29, 1971, Governor Rockefeller sent to the New York State Legislature a Special Message relating to the problems of welfare and welfare reform and recommending legislation to meet the problems and to cope with new objectives. In that Message he stated as to the general issues involved in the legislation at issue in this case (Ex. 38, p. 3):

> "• • • I am recommending a complete reorganization conceptually and structurally, of the welfare program for New York State in order to give greater opportunity and incentive to the individual to achieve independence, self-sufficiency, and human dignity.
>
> "Many aspects of the present welfare system actually undermine rather than strengthen the dignity and

* Numbers in parentheses, unless otherwise stated, represent page numbers of the printed Appendix.

self-respect of the individual and discourage the desire and initiative to work, to achieve self-sufficiency and independence and to accept responsibility.

• • •

"The result is that we are actually encouraging a larger and larger segment of our society, from the early years of childhood, to a permanent dependence on government and a failure to assume individual responsibility, or to develop a pride in their community.

"My purpose in recommending far-reaching reorganizational proposals is to see to it that we not only continue to meet the basic needs of those who cannot do for themselves, but that we also encourage the young and able-bodied, temporarily in need of assistance through no fault of their own, to achieve the education and the skills, the motivation and the determination that will make it possible for them to become increasingly self-sufficient, independent citizens who can contribute to and share in the responsibility for their families and our society."

As to the specific legislative proposals which became chapters 101 and 102 of the Laws of 1971, the Governor's Message continues (Ex. 38, pp. 8-9):

"Work is essential to a healthy individual and a healthy society.

"Welfare should be a bridge to work for those able to work, as well as a shield against want.

"Welfare benefits should aid those who work and need supplemental help.

"But welfare benefits will not be a substitute for work.

"The welfare legislation I am submitting to your Honorable Bodies therefore:

"1. Redefines employability and limits the discretion of local social services districts to declare an individual unable to work;

"2. Requires every employable public assistance recipient to report to the State Employment Service every two weeks to pick up his assistance check instead of having it mailed by the welfare district as is presently done;

"3. Requires a bi-weekly employment counselor interview through which an employable public assistance recipient would be directed to a private job opportunity, or a training program, or a public works project;

"4. Requires every social service district to provide or contract for a public works program—including neighborhood environmental and day care center work—to which the Employment Service may assign appropriate employable recipients;

"5. Directs the Employment Service to locate and develop employment opportunities for unskilled public assistance recipients, to maintain a special job register, and to provide job preparation and follow-up services;

"6. Denies welfare to an employable individual who quits a job without good cause or refuses a job he or she is able to perform."

Thus, the welfare reform program had broad benevolent social purposes and was not a repressive measure designed solely to alleviate the State's fiscal crisis, as alleged by plaintiffs in the District Court. The bills which became chapters 101 and 102 were passed by the Legislature and sent to the Governor on April 7th. On May 13th, the State Department of Social Services issued its first Administrative Letter to local social services commissioners explaining chapter 102 (work referral program) in terms of the new statutory definition of employability and directing local social services districts to immediately review their undercare caseloads and bring information up to date in order that "each local social services district have as much time

as possible to prepare for the orderly implementation of the Law," which was to take effect on July 1, 1971 (50-53, and Ex. 5, p. 2). This Administrative Letter was followed up on June 9, 1971, with more detailed instructions on policy and procedure for the referral of unemployed employables to the Department of Labor for check delivery and receipt of employment services (53-80, and Ex. 6). Local social services commissioners were advised that the State Department of Social Services had had discussions on clearances and implementation of the law with both the State Department of Labor and the United States Social Security Administration. In this regard, the Letter states (54, and Ex. 6, pp. 1-2):

> "Obviously, it will be necessary for you to establish close working relationships with the local offices of these agencies to assure that everything possible is done to achieve an orderly work flow so that the objective of the Law to restore employable recipients to employment may be accomplished without confusion, or harassment to the recipients."

Local offices were also advised at that time of planned special meetings around the State with local commissioners and representatives of their staffs to explain and clarify policy and procedures. This Letter also further defined the statutory definition of employable, clearly explaining the meaning of the terms used in the State statute (57-58, and Ex. 6, pp. 4-5):

> "All ADC or HR applicants or recipients age 16 and over shall be deemed employable except by reason of:
>
> (a) Full-time employment;
>
> (b) Attendance at school full-time for a minor other than an emancipated minor;
>
> (c) Attendance full-time in grade or high school for an emancipated minor;

(d) Full-time, satisfactory participation in an approved program of vocational training or rehabilitation, which shall include but not be limited to participation in the Work Incentive Program and a two-year college program with a specific vocational objective;

(e) Part-time employment to the extent permitted by medical verification, or because of inability to secure adequate care for children or other incapacitated members except on a part-time basis;

(f) Mental or physical illness or incapacity which has been medically verified to be of a significant or substantial nature so as to prevent such person from engaging in employment; age shall be a basis of unemployability only when it has been verified that the individual would be potentially hazardous to himself or others with whom he is associated; and persons with a history to drug addiction shall be deemed employable only when determined medically to be free of drug use, or participating in a methadone maintenance program or rehabilitation program; or,

(g) The need of such person to provide full-time care for other members of such person's household who are verified to be wholly incapacitated or who are children, and for whom required care is not otherwise reasonably available, notwithstanding diligent efforts by such person and the social services district to obtain services or the assistance of others to provide such care."

It should be noted in regard to the provisions of paragraph (g), above, that diligent efforts are required on *both* the part of the recipient and the local social services district to find day care for children and that without such efforts the person is considered unemployable.

In determining whether the mother's presence in the home is essential the local social services district is explicitly instructed to consider (60):

"(1) The nature and extent of the incapacity; what effect the mother's absence would have on the health and welfare of the incapacitated person; whether other services or the assistance of others is available, and whether such alternative plans would adversely affect the incapacitated person.

"(2) The number of children in the home, their respective ages, the existence of illness, handicap or special needs; what effect the mother's absence would have on the health and welfare of the children; whether an adequate plan of child care is available; and whether such plan of child care would adversely affect the health and welfare of children."

Thus, while the mere presence of children in a home is not to be deemed a deterrent to employment, adequate safeguards are provided in the regulations to assure that referrals of mothers or other parents for employment will not be adverse to the welfare of the children.

It should be noted that the enabling legislation, enacting the new section 350-k applying to ADC recipients, specifically provided that the public works projects must meet State and Federal requirements and that local expenditures for projects under section 350-k may be made only so long as participants remain eligible for Federal aid to dependent children (§ 350-k[6]). By letter, dated April 28, 1971, the HEW Regional Commissioner indicated that such projects would not be approved for Federal aid (Ex. 16). Consequently, section 350-k was not implemented, as provided in the state statute itself.

Title 18, New York Code of Rules and Regulations, was amended by adding a new part 385, relative to the Work Rules.

Should a public assistance recipient contest the determination that he is employable, he is entitled to a Fair

Hearing on that issue, without having to first refuse referral and be threatened with assistance termination or grant reduction (Deposition of George Demmon, pp. 92-93, Appendix, pp. 235-236; Deposition of Philip Pinsky, pp. 32-34, Appendix, pp. 226-228).

With the advent of the State's work referral program, employable recipients of public assistance in HR or ADC categories were subject to job referral under one of two programs. The Federal WIN Program, applicable only to ADC recipients, provides for job or training referral of certain categories of recipients in a limited geographic area (14 of New York's 64 social services districts). All employable HR recipients and employable ADC recipients not participating in WIN are referrable to employment under the State statutes here at issue.

Statistics as to the operation of the job referral program are most revealing as to its accomplishments. In July, 1971, the first month of operation, over 48,000 persons were referred to the State Employment Service (191). Of these, 14,035 were referred to jobs, and 1,127 to training (191). Of those referred to jobs, 1,861 were placed (191). In August, the number of persons reporting increased to 55,000 (191). Of these, 18,806 were referred to jobs and 1,316 to training (191). Of those referred to jobs, 3,405 were placed (191). The number reporting in September was again approximately 55,000 (192). Of these, 18,585 were referred to jobs and 1,201 to training (192). Of those referred to jobs, 4,110 were placed (192). Thus, excluding the first month when the program was just getting under way, the State Employment Service actually developed jobs for 20-25% of those referred to possible jobs. In November, the State Employment Service found jobs for 1,845 persons in occupational categories ranging from pro-

fessional, technical and managerial to structural work, at wage rates from under $1.85 per hour to over $4.00 per hour. It is significant that in the first four months of the program, and considering the then existent depressed state of the economy, the State Employment Service actually made job placements for approximately 9,000 persons.

A perspective on the development of the program is found in the Report of the Sub-Committee on Welfare Reform of the New York State Temporary Commission to Revise the Social Services Law, published in January, 1972 (Ex. 43). That report observes (p. 6) "in a time of slump, the fact is that jobs are being developed and placements of relief recipients are being made." Hearings were held by the Sub-Committee in late October, 1971 in Buffalo and Syracuse and mid-November, 1971 in New York City. Local social services and employment services administrators, representatives of social service staff organizations, client interest groups and public interest groups attended and testified at the hearings. The Sub-Committee's Report made six principal findings, among which are (pp. 1-2):

"1. The most illuminating impression gathered from the testimony is that a 180 degree change in attitude toward employable recipients of relief was generated by the 1971 legislation. Statutory requirements and regulations have for years been on the books to refer employable persons to the employment service, requirements which appear largely to have been relegated to perfunctory observance, if at all, by both the welfare districts and employment service operations.

"2. The screening of caseloads for identification of employables together with their being required to report to and pick up their assistance checks at employment service offices has proven salutory as a means of assessing current eligibility, resulting in some instances of reclassification of Home Relief

recipients to the Federally-aided Aid to the Disabled category, and in other instances of identifying outside employment income heretofore unknown to the local social services agency.

"3. No one or group appeared to take exception to the principle that welfare recipients who are employable should take employment when available."

The fact that the program is not static in its implementation is apparent from the further observation of the Sub-Committee (pp. 7-8):

> "Inasmuch as the work referral program was in somewhat of a shake-down phase as late as October, mutual adjustments between social services and employment service operations were still being worked out. It is interesting to note that many of the points of friction between the two systems which came out at the Buffalo and Syracuse hearings seemed to have been adjusted, or were in process of rapid adjustment by the time the Sub-Committee held their hearings several weeks later in New York City."

The Sub-Committee found some changes in the program and the statutes to be advisable and expressed its intention to sponsor appropriate legislation where statutory change was indicated. Among those changes would be the exemption of those in approved training programs from the check pick-up requirements, the exclusion of persons between the ages of 60 and 65 from the *mandatory* requirements of the statute, the assignment of the development of public work projects to the State Employment Service, arranging for full shelter allowance to be paid monthly rather than semi-monthly, and to set criteria with respect to transportation hardship. As stated previously, in this brief the exemption of trainees and shelter allowance provisions were enacted into law; the revision as to transportation hardship was accomplished by departmental regulation.

In the first year of operation of the program of work referral some 29,369 public assistance recipients were provided work experience, and an average of 50,000 persons each month were receiving manpower and referral services from the State Employment Service. It should be noted that the evidence in the record in this case, resulting from depositions taken of personnel of the State and local social services departments and of the State Department of Labor, shows that the program of work referral has been so administered that persons eligible for WIN referral are invariably referred to WIN, that only those persons not eligible for WIN referral, or for whom no place exists in the WIN program, are referred for employment pursuant to the State statute (226, 234-235, 239, 252-253).

The contrasting extent of the two programs is demonstrated from a comparison of statistics. In fiscal 1971, the Department of Social Services referred 17,511 individuals for participation in the WIN program. However, in fiscal 1971, the Federal Government allowed only 9,600 opportunities for enrollment in the WIN Program for New York State. On the other hand, between November, 1971 and June, 1972, there were approximately 125,000 referrals, within the scope of seven months, under the State work referral program.

The WIN Program is restrictive geographically in the sense that it exists in only 12 of the State's 64 social services districts. The actual designation of the number of districts within which the program operates is made by the Federal Secretary of Labor. It is estimated that during 1971-72, the WIN Program was able to provide services to 30,000 clients; *i.e.*, 15,000 at any one time with a 100% annual turnover. Under the revised WIN program, effective July 1, 1972, it was initially estimated that there would be 75,000 registered ADC recipients who would be poten-

tial WIN participants. The program, as originally funded by the Federal Government, would not have the capacity to accommodate more than a fraction of this number. Since the inception of the revised WIN Program, the Federal-State contract has twice been revised to increase the funding and thus the number of persons who may be serviced under the WIN Program. The program is still limited, however, to only 14 social services districts and, according to State estimates, to no more than 63,000 persons. The WIN Program's extent and inclusiveness, however, are determined not by the Federal statute but by available funding and by the discretion of the Federal Secretary of Labor.

In January to June, 1972, there were 2,657 job placements under the WIN Program, operating in districts accounting for 90% of all ADC recipients, while under section 131(4) some 5,323 persons were placed in jobs statewide.

B. The District Court Decision

The District Court, in its decision, rejected plaintiffs' contentions that the statutes violate the Thirteenth and Fourteenth Amendments to the Constitution of the United States. As to the contention regarding the Thirteenth Amendment, the Court observed: "Requiring employable persons on public assistance to engage in employment, if available, in the absence of circumstances different from those presented in this case, is entirely proper."

As to the contentions as to the Fourteenth Amendment, the District Court stated:

> "A statutory classification in the area of social welfare, however, is consistent with the Equal Protection Clause if it is 'rationally based and free from invidious discrimination,' see *Dandridge* v. *Williams*, 397 U. S. 471 (1970). The Work Rules reflect a judgment by

> the state's Executive and Legislature that a drastic revision of the state's welfare program was in order. This court cannot say that the Rules are without a rational basis under the circumstances."

As to the Due Process Clause violation arguments, the Court found no denial of due process, although it did find that recipients needed to be advised of their rights to fair hearings and the Court directed that suitable means of notifying HR (Home Relief) recipients of their right to fair hearings on the issue of employability be implemented within thirty days after filing of the decision.

Although upholding the statutes as against claims of unconstitutionality under the Thirteenth and Fourteenth Amendments, the Court did hold the State statutes to be in conflict with the Federal Social Security Act, specifically the WIN Program, and thus to be in violation of the Supremacy Clause of Article VI of the Constitution of the United States.

In so doing, the Court relied primarily upon a decision of the United States District Court for the Eastern District of Virginia (*Woolfolk* v. *Brown,* 325 F. Supp. 1162 [1971], affd. 456 F. 2d 652 [4th Cir., 1972], cert. den. ____ U. S. ____ [Oct. 10, 1972]), for although the Court also cited an Oregon case (*Bueno* v. *Juras,* 349 F. Supp. 91 [1972]), the Oregon Court had relied solely upon the *Woolfolk* case for its decision. The *Woolfolk* case, however, involved specific questions as to the specific individuals residing in an area where the WIN Program was in operation and who had not been found to be inappropriate for WIN referral prior to their referral for employment under the State program. The instant case, however, involves a class of plaintiffs some of whom reside in social services districts in which WIN is not in operation and a fact situation wherein the administrators of the program concede that WIN referral takes precedence over the State program.

Summary of Argument

It is the position of the State of New York that the WIN Program, as enacted by Congress and as administered by the United States Department of Labor, was not intended to be the sole and exclusive method by which public assistance recipients could be referred for employment. The State agrees that those recipients who are eligible for WIN referral must be referred to WIN and that, where there is space available for them in the WIN Program, they must be processed through that program for job referral. It is also the State's position that while the Federal Social Security Act does not prohibit a complementary State program under which recipients residing in non-WIN districts or for whom space is not available in the WIN Program or who are ineligible for WIN referral, although still factually employable, may be referred to employment or placed in public service employment pending job placement in the regular economy.

Since the WIN Program from its inception in New York State has been less than statewide in operation, as determined by the United States Secretary of Labor, and has provided by the terms of the contracts between the United States Department of Labor and the State of New York for the funding necessary to service only a fraction of the employable recipients of public assistance, and since the number of persons serviced under the Federal Act is not determined by the Federal Social Security Act but rather by administrative determinations and availability of funds, the Federal Act was not intended to be and is not the exclusive procedure for job referrals of public assistance recipients. Furthermore, where Congress has devised a method for referring public assistance recipients to employment and has, by the Talmadge Amendments in 1972 (P. L.

223), increased the emphasis on job replacement, and yet not made the program all inclusive, Congress could not have intended to defeat its ultimate objective of economic self-sufficiency of welfare recipients by depriving the States of the power to provide for complementary legislation covering those persons and areas not included in the Federal Act or funding.

ARGUMENT

The Federal Social Security Act was not intended nor does it operate to pre-empt the entire field of welfare legislation. It establishes only minimum standards and New York's Work Rules are within the area of discretion remaining to the States under the Social Security Act.

A.

Initially, it must be observed that insofar as the Work Rules apply to recipients of Home Relief, a non-federally aided category of assistance, the supremacy argument has no bearing. Since the Social Security Act in no way regulates state programs under that category of assistance, there can be no pre-emption of state power in regard to the Home Relief program. Thus, the issues on this appeal are addressed solely to recipients in the ADC and ADC-U categories.

Appellees contended below that the Work Rules constitute an additional condition of eligibility for assistance and thus are invalid and in conflict with the Federal Social Security Act.

However, State statutes and regulations providing for work referral and penalizing recipients for refusal to accept employment are not in conflict with the Federal Social

Security Act. One of the basic purposes of the Federal Act is to help parents or relatives of dependent children "to attain or retain capability for the maximum self-support and personal independence" (42 U. S. C. A. § 601). Additionally, the Federal Act specifically authorizes the States to disregard, in determining family need, the needs of any person who in the preceding thirty days or more has either deliberately reduced earning capacity, quit a job or refused to accept employment offered through the State Employment Service (42 U. S. C. A. § 602 [a(8)]). The New York Work Rules do no more than implement the intent of those sections by providing for the referral of employable public assistance recipients to employment. They add no new conditions of eligibility not already contemplated by the Federal Act.

Appellees also contended in the District Court that the New York Work Rules are invalid because they provide for personal delivery of checks, rather than delivery by mail. They contended that this conflicts with the intent of the Federal law, citing guidelines which are directed toward a potential that personal delivery might be conditioned on payments to other persons, rather than securing to the welfare recipients the full benefit of the checks (HEW Handbook of Pub. Assist. Admin., Part IV, §§ 5253.2, 5254). There is, however, no question but that under the New York Rules welfare recipients are entitled to the unconditional delivery of their checks, that that delivery is not even conditioned on compliance with the Work Rules. The testimony in the depositions is clear that a recipient is entitled to receive his check even if he refuses manpower services from the State Employment Service. There is thus no potential under the New York Work Rules for conditional delivery of checks.

Appellees also contended that the New York statutes violate the requirements of the Federal Act that a single state agency administer the state plan for public assistance. The Federal law requires that the state agency either singly administer, or singly supervise the administration of the state's plan for public assistance. New York's plan provides for state supervision, not administration. In any event, the testimony in the record is clear that the State Employment Service acts under the directives of the State and local social services departments and that all ultimate decisions are made by the social services agency. The witnesses made it very clear in their depositions that determinations of employability are made only by the local social services department, that determinations of non-compliance and eligibility are made only by the local social services agency and that all utlimate responsibility for the administration of the work referral program, and all administration of the public works project program, lies in the social services agencies.

The intent of the Federal Act was to prevent the intrusion into the ultimate decision-making process of non-social services agencies, and in part, at least, to prevent Federal funds from being diverted to non-social services agencies, a problem not present under the statutes at issue here.

Even more to the point, however, is the fact that the Federal law itself contemplates the participation of state employment services. These agencies are the agencies which administer the WIN Program under the Federal statute; and the Federal law authorizes denial of assistance to persons who have refused jobs to which they have been referred by state employment services. It is also apparent from the debate on the 1971 amendments to the

Federal Act (The Talmadge Amendments) that Congress is itself very much concerned with the development of methods which will increase coordination between social services departments and state employment services in work referral programs (Congressional Record, December 14, 1971, p. S21641).

B.

The primary contention of the appellees has been simply that the Federal Social Security Act was intended to pre-empt the entire field of welfare legislation and work referral and that New York's statute and regulations unconstitutionally conflict with the Federal Act. In this regard, it must be understood that a constitutional conflict does not automatically result from State and Federal legislation in the same fields. Pre-emption requires much more than this.

Thus, in *Huron Portland Cement Co.* v. *City of Detroit* (362 U. S. 440 [1959]), it was held that a Detroit ordinance designed for the elimination of air pollution was valid despite Federal inspection laws which prescribed the method of construction of boilers to be used on sea-going vessels. This Court there said (p. 446):

> "We conclude that there is no overlap between the scope of the federal ship inspection laws and that of the municipal ordinance here involved. For this reason we cannot find that the federal inspection legislation has pre-empted local action. To hold otherwise would be to ignore the teaching of this Court's decisions which enjoin seeking out conflicts between state and federal regulations where none clearly exists. *Savage* v. *Jones*, 225 U. S. 501; *Welch Co.* v. *New Hampshire*, 306 U. S. 79; *Maurer* v. *Hamilton*, 309 U. S. 598."

"It is well settled" as the First Circuit Court of Appeals said in *Chrysler Corp.* v. *Rhodes* (416 F. 2d 319 [1969]), that "where the State's police power is concerned pre-emption will not be presumed" (*Engineer* v. *Chicago R. I. & R. R. Co.*, 382 U. S. 423 [1966]).

The rule as to whether a Federal law has pre-empted the right to regulate from the State is that *the intention to supersede the State's police powers must be clearly evidenced by the Federal legislation.* The intention to regulate exclusively will not be implied unless the Federal and State laws are inconsistent (*New Mexico Board of Examiners* v. *Roberts*, 70 N. M. 90, 370 p. 2d 811 [1962]). No intention to supersede the State's right to legislate in this area of public welfare has been shown. No inconsistencies between the New York Work Rules and Federal Law or regulations have been shown. (It must be remembered that the testimony in the depositions clearly shows that where WIN projects are in existence, persons appropriate for WIN will be referred there rather than to employment under the Work Rules.)

The requirement that a Congressional intent to pre-empt a field of legislative concern must be clearly and unequivocally demonstrated was forcefully stated by this Court in *Schwartz* v. *Texas* (344 U. S. 199, 202-203 [1952]):

> "If Congress is authorized to act in a field, it should manifest its intention clearly. It will not be presumed that a federal statute was intended to supersede the exercise of the power of the state unless there is a clear manifestation of intention to do so. The exercise of federal supremacy is not lightly to be presumed.
>
> "'The principle thus applicable has been frequently stated. It is that the Congress may circumscribe its regulation and occupy a limited field, and that the intention to supersede the exercise by the State of its

authority as to matters not covered by the federal legislation is not to be implied unless the Act of Congress fairly interpreted is in conflict with the law of the State.' *Atchison, T. & S. F. R. Co.* v. *Railroad Commission*, 283 U. S. 380, 392-393. See *Savage* v. *Jones*, 225 U. S. 501, 533.

"'It should never be held that Congress intends to supersede or by its legislation suspend the exercise of the police powers of the States, even when it may do so, unless its purpose to effect that result is clearly manifested.' *Reid* v. *Colorado*, 187 U. S. 137, 148."

In that case, this Court held that the Federal Communications Act, which made the disclosure of information secured by wiretaps a Federal crime, did not prevent the use of wiretap testimony in State court proceedings, even when in Federal courts such information was not considered admissible. When, eventually, wiretap evidence was held to be generally inadmissible in State court proceedings, that was done not by holding that the Federal law pre-empted State law, but rather under provisions of the Constitution other than the Supremacy Clause.

In *Florida Lime & Avocado Growers, Inc.* v. *Paul* (373 U. S. 132 [1963]). this Court held the test of pre-emption to be: Does the State regulation impair the Federal superintendence of the field? If there is no collision between the Federal and the State regulation, the Court said (p. 143):

"Thus the present record demonstrates no inevitable collision between the two schemes of regulation, despite the similarity of the standards.

"The issue under the head of the Supremacy Clause is narrowed then to this: Does either the nature of the subject matter, namely the maturity of avocados, or any explicit declaration of congressional design to displace state regulation, requires § 792 to yield to the federal marketing orders?"

This Court there stated as a further test of pre-emption (p. 141):

> "Whether a State may constitutionally reject commodities which a federal authority has certified to be marketable depends upon whether the state regulation 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress,' *Hines* v. *Davidowitz*, 312 U. S. 52, 67. By that test, we hold that § 792 is not such an obstacle; there is neither such actual conflict between the two schemes of regulation that both cannot stand in the same area, nor evidence of a congressional design to pre-empt the field."

And additionally (p. 142):

> "The test of whether both federal and state regulations may operate, or the state regulation must give way, is whether both regulations can be enforced without impairing the federal superintendence of the field, not whether they are aimed at similar or different objectives."

In the instant case, while both the State and Federal laws are aimed at similar objectives: restoring employables to independence and self-sufficiency, the evidence shows that they operate in compatible areas, that referrals to the WIN program take precedence, where applicable, over referrals under either section 131(4) or section 350(k) (public work projects), that the criteria by which employability is determined are substantially the same under both the State and Federal laws, that there is, in fact, no irreconcilable conflict between the two areas of operation, and that the State Law does not stand as an obstacle to the accomplishment of the objectives of Congress.

Having found no irreconcilable conflict between the State and Federal regulations, this Court in the *Florida* case *supra*, stated one further consideration under the Supremacy Clause (p. 146):

"Since no irreconcilable conflict with the federal regulation requires a conclusion that § 792 was displaced, we turn to the question whether Congress has nevertheless ordained that the state regulation shall yield. The settled mandate governing this inquiry, in deference to the fact that a state regulation of this kind is an exercise of the 'historic police powers of the states,' is not to decree such a federal displacement 'unless that was the clear and manifest purpose of Congress,' *Rice* v. *Santa Fe Elevator Corp.*, 331 U. S. 218, 230."

(See, also, *Joseph E. Seagram & Sons, Inc.* v. *Hostetter*, 384 U. S. 35, 45-46 [1966].)

In *Cloverleaf Co.* v. *Patterson* (315 U. S. 148 [1941]), this Court stated (pp. 155-156):

"• • • It has been long recognized that, in those fields of commerce where national uniformity is not essential, either the state or federal government may act. *Willson* v. *Black-bird Creek Marsh Co.*, 2 Pet. 245; *California* v. *Thompson*, 313 U. S. 109, 114. Where this power to legislate exists, it oftens happens that there is only a partial exercise of that power by the federal government. In such cases the state may legislate freely upon those phases of the commerce which are left unregulated by the nation. But when the United States exercises its power of legislation so as to conflict with a regulation of the state, either specifically or by implication, the state legislation becomes inoperative and the federal legislation exclusive in its operation.

"When the prohibition of state action is not specific but inferable from the scope and purpose of the federal legislation, it must be clear that the federal provisions are inconsistent with those of the state to justify the thwarting of state regulation." (Emphasis supplied.)

The Federal Social Security Act does not specifically preempt the field of social welfare legislation by prohibiting state legislation in the field; it has indeed been described as creating an area of "cooperative federalism". In fact, the

Act establishes only minimum federal requirements for State plans of assistance to certain specific categories of persons in need of assistance. That it does not cover the entire field of welfare is apparent from the fact that there are categories of aid which are totally State supported (such as Home Relief) because the Congress did not see fit to legislate at all as to the persons provided for therein. More importantly, this is not the first case in which the issue of pre-emption has been raised in regard to the Federal Social Security Act and State statutes or regulation. Both the Federal and the State courts have considered the issue of pre-emption in the past, with almost uniform results.

In *Snell* v. *Wyman* (281 F. Supp. 853 [S. D. N. Y., 1968], affd. 393 U. S. 223), the Court considered a New York statute which provides for recovery of previously paid welfare benefits from assets of recipients, such as equity in real estate, bank accounts, proceeds of lawsuits or insurance policies, etc. The District Court there held that the Federal Social Security Act did not prohibit such legislation, either directly or by implication, and that the State statute was not rendered invalid simply because it did not accord with the social philosophy of either the plaintiff or the Court (281 F. Supp., at p. 863).

Less than two years ago this Court specifically held that the Federal Act did not pre-empt the field of welfare legislation, *even in areas covered by the Federal Act itself* (*Dandridge* v. *Williams, supra*). In that case, holding valid a Maryland statute which set a maximum limit on the number of children in a family for which ADC would be paid, this Court held as to the power of the States to legislate (397 U. S., p. 478):

> "In *King* v. *Smith, supra* (392 U. S. 309), we stressed the States' 'undisputed power,' under these provisions of the Social Security Act, 'to set the level of benefits and the standard of need.' *Id.*, at 334. We described the AFDC enterprise as 'a scheme of cooperative federalism,' *id.*, at 316, and noted carefully that '(t)here is not question that States have considerable latitude in allocating their AFDC resources, since each State is free to set its own standard of need and to determine the level of benefits by the amount of funds it devotes to the program.' *Id.*, at 318-319. * * * Thus the starting point of the statutory analysis must be a recognition that the federal law gives each State great latitude in dispensing its available funds."

In a case particularly appropriate here, the Supreme Court of Wisconsin held that the WIN program does not prevent other work requirements (*Stacy* v. *Ashland County Dept. of Public Welfare*, 159 N. W. 2d 630 [1968]). In that case the local welfare agency required a mother to accept employment; she was offered part-time work, nursing care for her mother and baby-sitters for her children when needed. The recipent claimed that since she could not be required to participate in the WIN Program, she could not be required to work under the State plan. Court rejected the argument stating (p. 636):

> "While a welfare agency has the right to spend public funds to promote the welfare program, it also has the responsibility not to spend taxpayers' funds beyond the limits of those purposes. Those who do not qualify should be denied benefits."

An Illinois statute provides for deductions from welfare checks for previously furnished emergency assistance. The United States District Court for the Northern District of Illinois held that the Federal Act does not prohibit such deductions, even though the law does prohibit deductions for prior overpayments or loans (*Acosta* v. *Swank*, 312 F. Supp. 765 [1970]).

In *Ramos* v. *Montgomery* (313 F. Supp. 1179 [S. D. Calif., 1970]), the Court found that the Federal Act's intent to maintain the family structure did not prevent State legislation which provided higher payments for children in foster homes than in their natural homes.

Only the *Woolfolk* case, relied upon by the plaintiffs and the District Court in this action, has held a State work requirement to be in general conflict wth the Federal Act (*Woolfolk* v. *Brown*, 325 F. Supp. 1162 [E. D. Va., 1971], affd. 456 F. 2d 652, cert. den. ____ U. S. ____ [Oct. 10, 1972]). Even in that case, the District Court specifically stated (p. 1170):

> "The Court is not ruling that persons receiving assistance are without obligation to accept employment."

In that case, however, the Court found that Virginia's rule sought to put recipients in employment in "an imprecise and summary fashion" (p. 1170). The Court also found that the Virginia rule was not meant to apply to those found to be appropriate for WIN or who volunteered and were referred to WIN, a fact which is also true of the New York rules. However, in *Woolfolk*, the Court found that the individual plaintiffs had not been found to be in appropriate for WIN referral and that therefore *the state rule was improperly applied to those plaintiffs*. In the instant case, despite the fact that appellees here have the same attorneys as did the plaintiffs in *Woolfolk*, there were no allegations in the complaint as to the ADC recipients referred to the State Employment Service as to whether any of them had been determined to be appropriate or inappropriate for WIN referral. Although the Court in *Woolfolk* limited its finding of invalidity of the state rule only to those areas in which the WIN program is in effect, we sub-

mit that the Court's further finding, that employment cannot be compelled where recipients are deemed inappropriate for WIN referral due to remoteness from a WIN project, was also in error. The Federal guidelines for WIN provide for the establishment of WIN projects only in areas where there are 1100 or more potential WIN referees. Thus, areas with less than 1100 employable public assistance recipients would most probably not have such a project established and the recipients in that area would be deemed inappropriate for WIN referral because of remoteness from a project. To hold that such persons could not be referred to available employment, solely because they are inappropriate for WIN because of remoteness, is contrary to the express purpose of the Federal Act to attain individual self-sufficiency and independence and to assist welfare recipients in moving from welfare rolls to payrolls. In view of the rejection by the District Court in *Woolfolk* of the theory that persons receiving assistance are without obligation to accept employment, its further findings concerning persons not appropriate for WIN referral are totally inconsistent. It is submitted that, at least in that respect, the *Woolfolk* Court was in error.

Not only do the Federal acts and the New York State statutes not conflict, they are in fact compatible in purpose and intent. This is apparent from an examination of both programs.

The Federal Social Security Act provides that appropriations under the ADC program are made, in part, for the purpose of helping parents and relatives of needy dependent children to "attain or retain capability for the maximum self-support and personal independence" (42 U. S. C. A. § 601). The Federal Act, under the WIN Program, provides for non-referral to that program of persons

who are ill, incapacitated, of advanced age, a child in full time school attendance, a person whose presence is required in the home to care for persons who are ill or incapacitated, or a person who is so remote from a WIN project as not to be able to effectively participate. (It should be noted that the language of the Federal Act as to appropriateness for referral is similar to the employability definition of Social Services Law, § 131[4].)

In the Congressional presentation of the Social Security Act amendments which became Public Law 92-223, Senator Long made some significant observations on the purpose of the work referral program under the Federal Act (Congressional Record, December 14, 1971, p. S21641):

> "One final word on this amendment. As the Senate knows, we will be legislating next year on extensive changes in the welfare system. I have views of my own, as I am sure other Senators do, about what we might do to improve the welfare programs; but in the meantime, I am pleased to see the Congress take this forward step in improving the work incentive program under existing law so that it can be more effective in enabling welfare recipients to become employed. As we know from a number of studies that have been conducted by the Department of Health, Education, and Welfare, most adults in families receiving welfare would prefer to work rather than remain on welfare. It is my hope that the amendments contained in the conference report will help these recipients in their efforts to become independent—efforts that are all too often frustrated today by the welfare system that is supposed to be helping them."

The guidelines issued by the United States Department of Health, Education, and Welfare for the Work Incentive program clearly express the purpose of that program to be one of work referral (Ex 45, § 31):

"The purpose of the Work Incentive Program is to provide an opportunity for certain members of AFDC families, 16 and over, to be placed in paid employment immediately or to secure the necessary services to prepare them to get and hold jobs in order to become self-supporting or capable of supporting their families.

"Added to the obvious desirability of an adequate income is the recognition that employment is a necessary and healthy part of family living. Many of the persons served in this program have a sense of isolation from the mainstream of American life. By entering the world of work successfully, such individuals may see themselves in a new light in relation to their own sense of worth and their standing in the community. The family head who gains this new respect for himself cannot help but imbue his family with it and set a pattern for a new outlook and independent living."

In the District Court, appellees placed great emphasis on the hardships encountered by a few participants in the work referral program, but glossed over the fact that the individuals involved in these so-called hardship cases apparently numbered no more than 60 out of the more than monthly average of 50,000 persons involved in the referral program.

The accomplishments of the program, on the other hand, are demonstrated by the New York State Temporary State Commission to Revise the Social Services Law in its Report of January, 1972 (Ex. 43), which states (p. 4):

> "The salutary effect of the work referral program on welfare administration was universally testified to from one end of the State to the other."

And again (p. 6):

> "And, in a time of slump, the fact is that jobs are being developed and placements of relief recipients are being made."

The accomplishments of the New York work referral program were aptly set forth in remarks of Commissioner Wyman, one of the defendants here, at the Midwinter meeting of the New York Public Welfare Association in Rochester, New York, on January 20, 1972 (Ex. 44). At that meeting, the Commissioner reviewed the results of the program in the first five months of operation, stating:

> "Public welfare in 1971 became, to a substantial degree, a work-oriented program designed to move as many employable people as possible from welfare rolls to payrolls through work incentive payments, work training, work tests, work relief, and other means. And there has been noticeable progress toward achievement of these goals.
>
> "A preliminary analysis of the first five months show that the Governor's reform program has had a substantial impact on the situation of the employable welfare recipient.
>
> "There is no doubt that this first data indicates that the reform program was both necessary and has been effective.
>
> "In the first five months of the reform program's requirement that employable recipients report to the State Employment Service offices for job counseling and manpower services, 13,462 have been placed in jobs, an important first step in giving them a feeling of self-worth and a means to self-sufficiency. All of these job placements were not of long-term duration, but they were—most importantly—a work experience; a relationship with responsibility, and a chance to prove oneself. For many, it did, however, open the door to permanent employment and put an end to their reliance on public assistance."

The basic philosophy of the work referral program was also clearly stated by the Commissioner in those remarks when he stated:

"Some people talk of work as a demeaning demand, a beyond-reason expectation that detracts and denies the individual the meaning of freedom and the exercise of choice. But work is not an obligation that makes less of a man, but rather it makes more of a man. When a man loses a job, he loses more than money. Work is more than a provision of income—although too many people interpret the work requirement as a cold and callous insistence that everyone must 'work or starve.'

"But work is more than doing a job, putting in time and collecting pay. Work is a source of interest, of friendship, and of activity that gives meaning and fulfillment to life. A graver consequence of loss of job, beyond the curtailment or elimination of income, is that an individual is likely to lose confidence in himself. People ask him what he is doing and where he works. He is reluctant to say he is not working because this might seem to be an admission that he is less effective than other people. His sense of his own prestige is diminished.

"So when work is made a requirement, it is not done in a punitive sense, because there is a personal need for being needed, of having personal worth, of having personal capabilities and talents which are utilized and made productive. Measured in these unchallengeable terms, the work requirement becomes even more important and more necessary to the individual, in addition to the entire system."

Contrary to appellees' assertions in the District Court, the work referral program is compatible with the intent of the Federal Act. It has both a beneficial purpose and effect, and has accomplished much of value to the welfare recipients in the few months that it has been in operation. New York's program in no way so conflicts with the Federal Act that it is rendered invalid under the Supremacy Clause.

C.

Both the plaintiffs in the District Court and the Court itself placed considerable emphasis on the differences in procedures under the WIN Program and under the State's Work Rules, contending that these differences were significant on the issue of incompatibility of the State and Federal statutes. Where, however, as here, the Federal and State programs involve different people (recipients referred under the State program are not the same people as those participating in WIN), the differences in procedure are not material to the issue of pre-emption. The issue really is whether the Federal program was intended to be all inclusive and to pre-empt State programs of work referral of public assistance recipients.

Certainly Congress knew that under 42 U. S. C. § 632(a), the Secretary of Labor would establish WIN Programs only in those state political subdivisions in which the Secretary determined "there is a significant number of individuals who have attained age 16 and are receiving aid to families with dependent children" and that "in other political subdivisions, he shall use his best efforts to provide such programs either within such subdivisions or through the provision of transportation for such persons to political subdivisions of the State in which such programs are established." The WIN guidelines, issued by the United States Department of Labor, provide for the establishment of WIN Programs only in those areas where there are at least 1100 potential WIN referees, thus eliminating many relatively lightly populated areas of states and many, cumulatively, potential job placements. In New York State, the WIN Program has been established by the Secretary of Labor in only 14 of New York State's social services districts. WIN is not available and can-

not be made available to recipients in the majority of the social services districts because the Secretary refused to authorize additional WIN Programs in the other districts, and adequate transportation does not exist for potential enrollees in these districts. Thus many public assistance recipients are denied the benefits of the Federal job placement program.

In terms of sheer numbers, the inadequacy of the WIN Program as a comprehensive program of job placement of welfare recipients becomes clearly apparent. In fiscal 1971, 17,511 individuals were referred for participation in the WIN Program, but the Federal government allowed only 9,600 opportunities for enrollment. In the same fiscal year (in only 7 months of that year) 125,000 referrals were made under New York State's work referral program. Those numbers alone indicate that the Federal program was not intended to be pre-emptive. The Federal program is limited to only a fraction of the State's welfare districts. While those districts included in the WIN Program do service approximately 90% of the welfare recipients in the State, a program cannot be said to pre-empt the field of job referral when it leaves out even a fraction of potential referees, either geographically or by limitation of funding. More people have been placed in jobs under the State's work referral program than under WIN and, even though after the decision of this case in the District Court the State and the Federal Department of Labor entered into a modification of the existing WIN contract to substantially increase the number of persons serviced under the WIN Program, it still is not all inclusive either in terms of numbers of people covered by the contract nor in geographical area covered; the same welfare districts are still excluded from the WIN Program as were before the modification.

The limitations and discretion in the Federal statute as to the extent of the WIN Program clearly demonstrate a Congressional intent that the act not pre-empt the power of the states to adopt complementary legislation providing programs servicing those social services recipients not eligible for WIN referral or for whom there is no room in the program, either by reason of limitations of geography, space availability, or funding.

For these reasons, we submit, the provisions of the Federal Social Security Act establishing the WIN Program do not exclude the states from developing their own complementary programs of work referral for public assistance recipients. The Court below, therefore, erred in holding that Chapters 101 and 102 of the New York Laws of 1971 are unconstitutional as being in violation of the Supremacy Clause of Article VI of the Constitution of the United States.

CONCLUSION

The judgment below should be reversed and judgment should be directed holding Chapters 101 and 102 of the New York Laws of 1971 to be constitutional and valid.

Dated: February 20, 1973.

Respectfully submitted,

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APPENDIX

New York Law of 1971, Chapter 101

New York Law of 1971, Chapter 101 provides:

"Section 1. Section one hundred sixty-four of the social services law, such section having been added by chapter seven hundred fourteen of the laws of nineteen hundred fifty-nine, paragraph a of subdivision two thereof having been last amended by chapter six hundred seventy-three of the laws of nineteen hundred sixty-two, is hereby amended to read as follows:

"§ 164. Work relief. 1. As hereinafter provided, employable persons receiving home relief shall be required to perform such work as shall be assigned to them by the social services official furnishing such home relief or by the state industrial commissioner as hereinafter provided.

"2. (a) The social services official of a county, city or town which is responsible for providing home relief shall provide for the establishment of public work projects for the assignment of employable persons in receipt of home relief to perform work for such county, city or town or for the state, and the head of any department, bureau, division or other unit thereof may request that such persons be assigned to his unit. In providing for the establishment of such public work projects, such social services official may contract with the state industrial commissioner for the establishment and implementation of such projects, for the assignment to them of persons registered under subdivision four of section one hundred thirty-one of this chapter, and for such other matters deemed necessary, desirable or convenient for the effective administration of this section. In the case of a county social services district which is reponsible for providing home relief within towns or cities within the county, persons may be assigned to work for the state or any city, town, or village in the county and the head of any department, bureau, division or other unit of the state or any such city, town or village may request such assignment. In

the case of a town which is responsible for providing home relief within a town, persons may be assigned to work for any village in the town and the head of any department, bureau, division or other unit of any such village may request such assignment. The request shall be addressed to the social services official or to the state industrial commissioner, in appropriate instances, and shall indicate the number of persons who can be used and the character of the work to be performed.

"(b) The social services official or the state industrial commissioner shall thereupon assign such persons in receipt of home relief who, in his judgment, are able to perform the work indicated, provided he is satisfied that such persons will not be used to replace, or to perform any work ordinarily and actually performed by, regular employees of any department or other unit of such county, city or town, or to replace, or to perform any work which would ordinarily be performed by, craft or trade in private employment.

"3. (a) Persons shall be assigned to perform only such work as they are able, in the judgment of the social services official or the state industrial commissioner, to perform.

"(b) The number of days of work to be given each person shall be determined by the amount of the budget deficit of the recipient and his family computed on local home relief budget schedules. No person shall be required to work for more than the number of days necessary to earn such amount or to be paid more than such amount. No person shall be required to work more than eight hours in a day or more than forty hours in a week.

"4. Any person who refuses to report for or to perform work to which he has been assigned by the social services official or the state industrial commissioner shall thereupon become ineligible for home relief.

"§ 2. Such law is hereby amended by adding thereto a new section, to be section three hundred fifty-k, to read as follows:

"§ 350-k. Public works projects. 1. Public works projects meeting state and federal requirements shall be established, or the establishment thereof shall be provided for, by every social services district for the conservation of work skills and/or the development of new skills of parents and other eligible relatives receiving aid to dependent children from such district.

"2. In providing for the establishment of such projects, the district may contract with the state industrial commissioner for the establishment and implementation of such projects, for the assignment to them of persons registered under subdivision four of section one hundred thirty-one of this chapter, and for such other matters deemed necessary, desirable or convenient for the effective administration of this section.

"3. A parent, or other eligible relative whose maintenance is included in the grant and allowances, may be assigned to participate in such a public work project, only if: (a) appropriate standards of health, safety and other work conditions are maintained;

"(b) the number of days work to be given each person shall be determined in the case of a parent, by the amount of the grant or allowance, and in the case of such other eligible relative, by the amount included in the grant or allowance for his maintenance, provided that no person shall be required to work for more than the number of days necessary to earn such amount or to be paid more than such amount, or to work more than eight hours in a day or more than forty hours in a week.

"(c) such assignment would not result in the displacement of regular workers or in the performance by such parent or relative of work that is being performed by employees of public or private agencies, institutions or organizations;

"(d) provisions are made to extend coverage to such parent or relative under the workmen's compensation law;

"(e) such person is deemed employable under the provisions of subdivision four of section one hundred thirty-one of this chapter;

"(f) provisions are made to permit such parent or relative to seek regular employment and/or to secure appropriate training or re-training opportunities which may be available.

"4. A parent or other eligible relative required to participate in a public work project who fails to participate in such project, without good cause, as defined by regulation of the department, shall thereupon become ineligible for aid to dependent children.

"5. Any inconsistent provision of this chapter or of any other law notwithstanding, a social services official may not bring an action or proceeding against any person, to recover for payments correctly made to a parent or other eligible relative on account of his participation in a public work project.

"6. (a) Expenditures may be made by a social services district on behalf of a parent or other eligible relative participating in a public work project, only so long as federal aid for aid to dependent children shall be extended to such expenditures.

"(b) Such expenditures shall be eligible for state reimbursement in accordance with the provisions of section one hundred fifty-three of this chapter.

"§ 3. Section eight hundred twenty-one of the labor law, as amended by chapter one hundred twenty-eight of the laws of nineteen hundred sixty-nine, is hereby amended to read as follows:

"§ 821. State training courses. The commissioner may provide for vocational and related, institutional and on-the-job training courses as described in section

five hundred ninety-nine of this chapter and for the administration of public works projects for recipients of public assistance, and may contract for these purposes with public and private agencies including public and private institutions of learning, employers or other appropriate organizations. He shall select for and refer to such training courses unemployed and underemployed persons who would meet the conditions for approval as specified in section five hundred ninety-nine of this chapter. He shall select and refer to public work projects all public assistance recipients registered at employment offices of the department who are neither referred thereby for employment in the regular economy or for occupational training, nor assigned to public works projects by public welfare officials. The commissioner may provide for such payments, either in advance or by way of reimbursement, from funds made available to carry out the purposes of this article, as he deems necessary.

"§ 4. This act shall take effect July first, nineteen hundred seventy-one."